STATE OF MICHIGAN

COURT OF APPEALS

SANDRA PIERZCHALA, Plaintiff-Appellant,	UNPUBLISHED June 13, 2013
v	No. 302874 Wayne Circuit Court
MGM GRAND DETROIT, LLC, Defendant-Appellee.	LC No. 10-011222-CK

Before: RIORDAN, P.J., and TALBOT and FORT HOOD, JJ.

PER CURIAM.

Sandra Pierzchala appeals as of right the trial court's February 22, 2011, order granting MGM Grand Detroit, LLC's ("MGM") motion for summary disposition and denying Pierzchala's counter-motion for partial summary disposition, and dismissing case. We affirm.

Pierzchala argues that the trial court erred when it granted MGM's motion for summary disposition.[1] We disagree. "This Court reviews a trial court's decision on a motion for summary disposition de novo."[2] "A motion for summary disposition under MCR 2.116(C)(8) tests the legal sufficiency of a complaint."[3] Thus, on appeal the pleadings alone are considered and "[a]ll well-pleaded factual allegations are accepted as true and construed in a light most favorable to the nonmovant."[4] Summary disposition under this subsection is proper if "the claim is so clearly unenforceable as a matter of law that no factual development could establish the claim and justify recovery."[5]

[1] MCR 2.116(C)(8).

[2] *Radina v Wieland Sales, Inc*, 297 Mich App 369, 372; 824 NW2d 587 (2012).

[3] *Liggett Restaurant Group, Inc v City of Pontiac*, 260 Mich App 127, 133; 676 NW2d 633 (2003).

[4] *Farmers Ins Exch v Kurzmann*, 257 Mich App 412, 417; 668 NW2d 199 (2003) (citation and quotation marks omitted).

[5] *Averill v Dauterman*, 284 Mich App 18, 21; 772 NW2d 797 (2009) (citation and quotation marks omitted).

First, Pierzchala is not entitled to relief for rescission of the alleged aleatory gambling contracts based on lack of capacity. On appeal, Pierzchala contends that each time she placed a bet at MGM an aleatory contract was created between them. She asserts that she is entitled to rescission of such contracts and return of her gambling losses because she lacked capacity to contract and MGM was aware of such incapacity. The Sixth Circuit has held that "[w]hen a person places money into a gambling game, that person is effectively entering into an aleatory contract with the casino; an aleatory contract is one in which a party's duty to perform is conditioned upon some fortuitous event, such as winning at a slot machine."[6] Pierzchala has failed to cite to any binding Michigan case law to support her assertion that when she placed bets at MGM, aleatory contracts were created. While she has cited case law from other jurisdictions, including the Sixth Circuit, it is well-settled that such cases have no precedential value to this Court.[7]

Assuming but not deciding that aleatory contracts existed in the instant case, Pierzchala has failed to demonstrate that lack of capacity is an accepted defense to avoid enforcement of an aleatory gambling contract. Although whether Pierzchala lacked capacity is a question of fact, whether a defense to a cause of action is recognized by this Court is a question of law.[8] This Court has found no binding case law to support Pierzchala's contention that her alleged lack of capacity can result in the rescission of her gambling contracts. The only case cited by Pierzchala that is even tangentially related to this assertion is a case from the Third Circuit. In *Tose v Greate Bay Hotel & Casino Inc.*, the plaintiff sought to recover his gambling losses that were incurred while he was allegedly "obviously and visibly intoxicated."[9] Tose's claim for recovery of his losses was based on the alleged negligence of the casino when it purportedly violated its duty "to refrain from knowingly permitting an invitee to gamble where that patron is obviously and visibly intoxicated[.]"[10] Not only is the court's decision in *Tose* non-binding, but it is also distinguishable from the instant case as Pierzchala's claim for recovery of her losses is purportedly under a contract theory. Thus, we find *Tose* unpersuasive. Accordingly, while for different reasons then cited by the trial court,[11] we find that summary disposition of this claim in favor of MGM was appropriately granted.[12]

Moreover, we note that Pierzchala alleges in her first amended complaint that MGM's awareness of her purported incapacity resulted in the breach of contract. Therefore, any such

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[6] *Romanski v Detroit Entertainment, LLC*, 265 F Supp 2d 835, 845 (ED Mich, 2003).

[7] *Allen v Owens-Corning Fiberglas Corp*, 225 Mich App 397, 402; 571 NW2d 530 (1997).

[8] *Citizens Ins Co of America v Juno Lighting, Inc*, 247 Mich App 236, 241; 635 NW2d 379 (2001); See also *Ewing v Heathcott*, 348 Mich 250, 252; 83 NW2d 210 (1957).

[9] *Tose v Greate Bay Hotel & Casino Inc*, 819 F Supp 1312, 1314 (D NJ, 1993).

[10] *Id*. at 1316 (citation and quotation marks omitted).

[11] *Taylor v Laban*, 241 Mich App 449, 458; 616 NW2d 229 (2000).

[12] *Averill*, 284 Mich App at 21.

demand for damages that were incurred before MGM was allegedly informed of Pierzchala's incapacity on September 30, 2003, is entirely improper.

Second, Pierzchala erroneously asserts that despite the enactment of the Gaming Act, she is entitled to recover her gambling losses pursuant to MCL 600.2939(1). MCL 600.2939(1) states:

> In any suit brought by the person losing any money or goods, against the person receiving the same, when it appears from the complaint that the money or goods came to the hands of the defendant by gaming, if the plaintiff makes oath before the court in which such suit is pending, that the money or goods were lost by gaming with the defendant as alleged in the complaint, judgment shall be rendered that the plaintiff recover damages to the amount of the said money or goods, unless the defendant makes oath that he did not obtain the same, or any part thereof by gaming with the plaintiff; and if he so discharges himself, he shall recover of the plaintiff his costs; but the plaintiff may at his election, maintain and prosecute his action according to the usual course of proceedings in such actions at common law.

This Court recently addressed this issue in the case of *Parise v Detroit Entertainment, LLC*.[13] In *Parise*, the plaintiff sought recovery of more than $600,000 in gambling losses from MotorCity Casino pursuant to MCL 600.2939(1), and argued that the statute was not preempted by the Gaming Act.[14] The *Parise* Court noted that while "MCL 600.2939(1) is a general statute that purports to apply to money or goods lost through gaming, the [Gaming Act] is a specific act that governs legalized non-Indian casino gambling in Detroit," and that MotorCity was a "Detroit casino licensee subject to the [Gaming Act]."[15] This Court in *Parise* noted that the Gaming Act provides that "'[a]ny other law that is inconsistent with this act does not apply to casino gaming as provided for by [the Gaming Act].'"[16] Accordingly, the Court held that "[s]ubjecting defendant to liability for patrons' gambling losses under MCL 600.2939(1) would be plainly inconsistent with the legalization of casino gambling as provided for by Proposal E and the [Gaming Act]."[17] The Court further found that "[a]s a participant in legalized casino gambling, plaintiff cannot claim the remedy provided by MCL 600.2939(1), with is clearly inconsistent with the [Gaming Act]."[18]

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[13] *Parise v Detroit Entertainment, LLC*, 295 Mich App 25; 811 NW2d 98 (2011).

[14] *Id*. at 26-27.

[15] *Id*. at 29.

[16] *Id*., quoting MCL 432.203(3).

[17] *Parise*, 295 Mich App at 29.

[18] *Id*. at 30.

Here, as in *Parise*, it is undisputed that MGM "is a Detroit casino licensee subject to the [Gaming Act]."[19] Therefore, because Pierzchala was allegedly engaged in "legalized casino gambling" at the time she suffered her alleged losses, in accordance with this Court's ruling in *Parise*, we find that the trial court did not err when it found that Pierzchala failed to state a claim for relief under MCL 600.2939(1).[20]

Third, the trial court properly dismissed Pierzchala's claims for conversion because of the expiration of the applicable statute of limitations. "Conversion is defined as 'any distinct act of domain wrongfully exerted over another's personal property in denial of or inconsistent with the rights therein.'"[21] A plaintiff may recover for statutory conversion if they are damaged as a result of "[a]nother person's . . . converting property to the other person's own use."[22] Both common law and statutory conversion are torts.[23] The statute of limitations for such claims alleging injury to personal property is three years.[24] Here, the last occurrence of gambling alleged in Pierzchala's first amended complaint was on December 9, 2006. Pierzchala, however, failed to file a complaint in this matter until September 28, 2010, over nine months after the applicable statute of limitations expired. Therefore, there was no error by the trial court.[25]

Fourth, Pierzchala has failed to state a claim for unjust enrichment. Unjust enrichment is an equitable doctrine.[26] "[I]n order to sustain a claim of . . . unjust enrichment, a plaintiff must establish (1) the receipt of a benefit by the defendant from the plaintiff and (2) an inequity resulting to the plaintiff because of the retention of the benefit by the defendant."[27] Pierzchala alleges in her first amended complaint that MGM was unjustly enriched when it accepted wagers from her, a known compulsive gambler, resulting in her impoverishment by the amounts of her gambling losses. Because Pierzchala has failed to state a claim for recovery, Pierzchala has not alleged an inequity entitling her to relief for unjust enrichment. As such, dismissal of the cause of action was proper.[28]

Fifth, Pierzchala's challenge to the trial court's ruling regarding her cause of action for respondeat superior also must fail. "Under the doctrine of respondeat superior, an employer may be vicariously liable for the acts of an employee committed within the scope of his

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[19] *Id*. at 29.

[20] *Averill*, 284 Mich App at 21.

[21] *Lawsuit Fin, LLC v Curry*, 261 Mich App 579, 591; 683 NW2d 233 (2004) (citation omitted).

[22] MCL 600.2919a(1)(a).

[23] See *Lawsuit Fin, LLC*, 261 Mich App at 591-593.

[24] MCL 600.5805(10).

[25] *Averill*, 284 Mich App at 21.

[26] *Morris Pumps v Centerline Piping, Inc*, 273 Mich App 187, 193; 729 NW2d 898 (2006).

[27] *Id*. at 195.

[28] *Averill*, 284 Mich App at 21.

employment."[29] Here, review of the first amended complaint reveals that Pierzchala's allegation of respondeat superior is not a separate cause of action, but rather an effort to impose vicarious liability on MGM for the alleged wrongful acts of its employees performed during the scope of their employment. Because, as explained above, Pierzchala has failed to state a claim for relief, any request for the imposition of vicarious liability on MGM for the actions of its employees is not warranted.

Finally, Pierzchala is not entitled to a declaratory judgment. "While the plaintiff must not only plead the facts entitling him to the judgment he seeks, he also must prove each fact alleged and, where he has failed to do so, a judgment in his favor would be improvidently granted."[30] As such, "an 'actual controversy' is condition precedent to invocation of declaratory relief."[31] Because an actual controversy fails to exist as the trial court appropriately dismissed all of Pierzchala's claims against MGM, her contention lacks merit.

Affirmed.

/s/ Michael J. Riordan
/s/ Michael J. Talbot
/s/ Karen M. Fort Hood

[29] *Helsel v Morcom*, 219 Mich App 14, 21; 555 NW2d 852 (1996).

[30] *Ravenna Ed Ass'n v Ravenna Pub Sch*, 70 Mich App 196, 200; 245 NW2d 562 (1976).

[31] *Id*. (citation and quotation marks omitted).